Hastings Constitutional Law Quarterly

Volume 9
Number 1 *Fall 1981*

Article 6

1-1-1981

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*By Sally A. Roberts**

Introduction

The judiciary clause of the Constitution,[1] which grants federal courts the power to hear "cases" and "controversies," does not include a provision that allows courts to refrain from deciding political questions.[2] The courts themselves have developed the political question

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1. U.S. CONST. art. III, § 2, cl. 1. The judiciary clause provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . . ." Courts can hear "cases" or "controversies," however, only when the parties have standing and when the issue is sufficiently ripe for adjudication. The power of courts to pass on the constitutionality of actions by the political branches was established in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

2. There has been some contention among legal scholars as to whether the political question doctrine applies equally to the Supreme Court and to the lower federal courts. One writer focused exclusively upon the Supreme Court: "I have not addressed myself, in this chapter or elsewhere, to the role of the lower federal courts. . . . Some of the methods and devices I have discussed are obviously not open to use in the lower courts." A. BICKEL, THE LEAST DANGEROUS BRANCH 198 (1962). Professor Bickel's view was criticized by Professor Wechsler, who stated, "[T]he conception of judicial review has never been regarded as a special doctrine governing the role of the Supreme Court as distinguished from the lower courts in the judicial hierarchy; and the techniques for the avoidance of decision that Bickel so lucidly discusses are addressed to the propriety of any judicial intervention, not merely to adjudication by the highest court." Wechsler, Book Review, 75 YALE L.J. 672, 675 (1966). In turn, Professor Wechsler's criticisms were challenged by Professor Tigar as being unjustified. Tigar interpreted Bickel as saying that lower courts could use the political question doctrine, but that the Supreme Court was focused on because that Court's pronouncements are final and authoritative. *See* Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1136-37 n.8 (1970).

The political question doctrine does not restrict state courts as it does federal courts. As Justice Rehnquist stated: "This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot, . . . so long as they do not trench upon exclusively federal questions of foreign policy." Goldwater v. Carter, 444 U.S. 996, 1005 n.2 (1979) (citations omitted).

doctrine which they invoke when declining to reach the merits of a dispute over which they have jurisdiction.[3] The doctrine thus "limits the exercise, not the existence, of federal judicial power."[4]

The political question doctrine has engendered great debate among legal scholars as to its nature and scope. The longstanding debate encompasses polar views. At one extreme are those who view the doctrine as based on the separation of powers only and who conclude that courts have a duty to decide all cases within their jurisdiction.[5] Supporters of this view believe that the only required constitutional interpretation is whether there has been a textual commitment of the issue to a coordinate branch of government. Such an inquiry is "*toto caelo* different from a broad discretion to abstain or intervene."[6]

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3. Chief Justice Marshall spoke of political questions in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and thus *Marbury* may be considered as the genesis of the political question doctrine in federal courts: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." *Id.* at 165-66.

4. Atlee v. Laird, 347 F. Supp. 689, 701 (E.D. Pa. 1972). *See* notes 41-46 and accompanying text *infra*.

5. This view, the "classical theory" of judicial review, stresses that the power to decide any question of law in a case before the court rests on a constitutional duty. This strict constructionist theory does not allow courts any discretion to avoid hearing disputes which satisfy the jurisdictional requirements. As a basis for this position, classical theorists rely on John Marshall's argument in *Marbury v. Madison* that the essence of judicial duty is to interpret the law: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

The discretionary feature of the political question doctrine "has been a stench in the nostrils of strict constructionists." L. HAND, THE BILL OF RIGHTS 15 (1958).

6. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959). Professor Wechsler, the leading protagonist of the classical theory, believes that the political question doctrine, to be in accord with the logic of *Marbury v. Madison*, must be viewed as a constitutional command. Wechsler's paper, the 1959 Oliver Wendell Holmes Lecture at Harvard Law School, was delivered in response to the 1958 Holmes Lecture by Judge Learned Hand. In his lecture, Hand had challenged the classical theory. *See* note 7 *infra*.

Other scholars also have challenged the classical theory. They argue that the theory fails to form a canon of interpretation to relate the various political question cases to the Constitution, and that the actual practice of courts does not fall within any pattern which would fit the interpretation. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 548 (1966). Professor Tigar argues along the same lines, saying that the Wechsler formulation "does not intelligibly account for all the cases, though it comes closest of any current definition to having a foundation in constitutional principle." Tigar, *supra* note 2, at 1153.

Those at the other extreme believe the doctrine is based on more flexible considerations—on prudence, and on a theory that courts thus have a broad discretion to abstain when it is expedient or politic to do so.[7] A doctrine based solely on prudence, however, is difficult for courts to apply because the theory is amorphous and has no firm guidelines.[8]

Between these extremes lie other theories that stake out a middle ground and draw support from aspects of both aforementioned views.[9]

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7. Followers of this view do not accept the historical justification of the classical theorists and find nothing in the text of the Constitution to support the power of judicial review. They rely on *The Federalist No.* 78 (A. Hamilton) for the view that the power is implied from the peculiar province of the courts as the interpreter of the laws. The courts are seen as the natural arbiters of disputes which arise in a system based on the separation of powers. Their conclusion is that the political question doctrine affords courts a broad discretionary power. *See* L. HAND, *supra* note 5. "[S]ince this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer." *Id.* at 15.

Professor Bickel is another who believes that courts are not obligated by a purported duty to hear all cases or controversies which are properly within their jurisdiction. He feels that, though the decision whether to hear a dispute should be based on principle, the great flexibility of the political question doctrine enables courts to yield to expediency. There are many prudential considerations involved. The basis of the political question doctrine in Bickel's assessment is "[t]he court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't; finally and in sum ('in a mature democracy'), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from." Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961). For an incisive critique of Bickel's reasoning, see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). *See also* A. BICKEL, *supra* note 2. For a review of Bickel's book, see Wechsler, *supra* note 2.

The Supreme Court's leading protagonist of the political question doctrine in recent times was Justice Felix Frankfurter, who inveighed against "[d]isregard of inherent limits in the effective exercise of the Court's 'judicial Power' " which would make judicial intervention futile and might also impair the Court's position and authority. Baker v. Carr, 369 U.S. 186, 266-67 (1962) (Frankfurter, J., dissenting). *Cf.* Frankfurter's opinion in Colegrove v. Green, 328 U.S. 549, 556 (1946) ("Courts ought not to enter this political thicket").

8. As Professor Henkin stated, "Bickel did not try to 'domesticate' his prudential concerns into guidelines, and would probably support abstention whenever he and the courts agreed that abstention was 'wise,' in the public interest most broadly conceived." Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 603-04 n.20 (1976). Tigar asserts that Bickel's view is a "clarion call for abandonment of principled bases of decision." Tigar, *supra* note 2, at 1145. The possible dangers from a lack of principle in political question decisions are explored in detail by Gunther, *supra* note 7.

9. For earlier discussions, see Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925). *See*

The most prominent of these theories was espoused by the Supreme Court in *Baker v. Carr*,[10] in which the Court adopted a six-part test that included textual commitment as well as prudential considerations.[11]

The Court in *Baker* identified different areas in which a political question was likely to arise; the field of foreign affairs was one such area.[12] In foreign affairs cases, as compared with those involving only domestic affairs, the Court recognized that more factors from the six-part *Baker* test probably would be implicated in considering whether to invoke the political question doctrine.[13] A judicial decision on the merits in a foreign affairs case is usually more complex and the potential consequences more far-reaching than that in a domestic affairs case.

A recent Ninth Circuit decision, *Hopson v. Kreps*,[14] focused on the political question doctrine in a foreign affairs case. At issue was the validity of Department of Commerce regulations which set quotas on subsistence whaling by Native Alaskan Eskimos.[15] The district court had dismissed the case as one presenting a political question,[16] but the circuit court reversed, finding that the district court had jurisdiction to decide the issue.[17]

This note focuses on the political question doctrine as presented in foreign affairs cases, describes guidelines prescribed by the Supreme Court for courts to follow in determining whether an issue constitutes a political question, and shows an application of such guidelines through an analysis of *Hopson v. Kreps*. The note first discusses the separation of powers function of the political question doctrine; second, it de-

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also Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (E. Cahn ed. 1954); Tollett, *Politial Questions and the Law*, 42 U. DET. L.J. 439 (1965).

The political question doctrine is difficult to define because it is invoked in such a wide variety of situations. Some commentators doubt whether there is, properly speaking, a "political question doctrine," or rather, a "cluster of disparate legal rules and principles." Tigar, *supra* note 2, at 1135. Tigar concludes that, "contrary to a view often expressed in recent years, the federal courts do not have an ambulatory and discretionary power to refuse decision of cases over which they have jurisdiction." *Id.* at 1136. *See also* Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977); Henkin, *supra* note 8; Scharpf, *supra* note 6; Note, *A Dialogue on the Political Question Doctrine*, 1978 UTAH L. REV. 523. *See generally* Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637 (1961).

10. 369 U.S. 186 (1962).

11. *See* notes 18-26 and accompanying text *infra*.

12. 369 U.S. 186, 211-13 (1962). Other areas categorized by the Court were questions regarding our republican form of government, the status of Indian tribes, the validity of enactments, and the dates of the duration of hostilities. *Id.* at 213-22.

13. *See* text accompanying note 54 *infra*.

14. 462 F. Supp. 1374 (D. Alaska 1979), *rev'd*, 622 F.2d 1375 (9th Cir. 1980).

15. *See* note 56 *infra*.

16. *See* notes 96-121 and accompanying text *infra*.

17. *See* notes 122-40 and accompanying text *infra*.

scribes the background of *Hopson v. Kreps*; third, it compares the district court's analysis of the political question issue with that of the circuit court. The note concludes that the Ninth Circuit erred in holding that a political question was not present in *Hopson v. Kreps*.

I. Foreign Affairs Cases and the Political Question Doctrine

A. *Baker v. Carr*: Touchstone for the Political Question Doctrine

The seminal case of *Baker v. Carr* is considered the leading authority on the political question doctrine.[18] In *Baker*, the Court thoroughly re-examined the political question doctrine and provided a framework for reviewing an issue to determine the applicability of the doctrine. The guidelines took the form of a six-part test:

> Prominent on the surface of any case held to involve a political question is found: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[19]

Although *Baker* concerned domestic affairs, the Court specifically directed attention to the foreign affairs branch of the political question doctrine.[20] The six-part test was set forth as a guideline for all political question determinations, whether foreign or domestic affairs were involved.

The Court in *Baker* noted that questions touching on foreign relations "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature," and often "uniquely demand single-voiced statement of the Government's views."[21] The Court pointed out that not all foreign affairs cases present political questions but rather re-

18. The Supreme Court reaffirmed the validity of the six-part *Baker* test in Powell v. McCormack, 395 U.S. 486 (1969), and most recently, in Goldwater v. Carter, 444 U.S. 996 (1979). The discussions of the political question doctrine in *Baker* and *Powell* have been referred to as "the most authoritative pronouncements to date of the Supreme Court on that matter . . . ." Matter of Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 945 (N.D. Cal. 1975).

19. 369 U.S. 186, 217 (1962) (numbers in brackets added). The Court applied the test and held that a political question was not present. *Id.* at 226.

20. *See* note 12 *supra*.

21. 369 U.S. 186, 211 (1962).

quire a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[22]

The importance of *Baker* lies in the Court's identification of the political question as "primarily a function of the separation of powers."[23] The scheme of government in this country is based on the constitutional separation of powers. If the political question doctrine acts as a function of the separation of powers, then the doctrine has its roots in the Constitution. Thus, if a court in performing the political question analysis finds any one of the elements of the *Baker* test "inextricable from the case at bar,"[24] it is required to dismiss the case.

The *Baker* test does not mandate that there be an express constitutional provision granting a certain power to another branch before a court is required to defer to that branch. Rather, the test involves a delicate exercise in constitutional interpretation. Many powers which today are deemed vested in the political branches are a result of constitutional interpretation rather than a textual commitment.[25] Only the first element of the *Baker* test speaks of a textual commitment. The other five factors reflect a certain amount of judicial deference to a coordinate branch which is based on the separation of powers. For example, the "potentiality of embarrassment" factor infers deference to the wider responsibilities of the political branches. The requirement that a court consider whether it must make an initial policy determination clearly speaks of decisions which should be made by the political branches. Similarly, the requirement that the court review whether it would have to make an independent resolution which would interfere with the specific responsibilities of another department is further indication of the underlying separation of powers function of the political question doctrine.[26]

B. The Foreign Affairs Power

The Supreme Court, in *Oetjen v. Central Leather Co.*,[27] a decision rendered early in this century, emphasized that the conduct of foreign affairs is vested exclusively in the legislative and executive branches. In *Oetjen*, the dispute was over the ownership of hides which Pancho

22. *Id.* at 211-12.

23. *Id.* at 210. *See generally* Nathanson, *The Supreme Court as a Unit of the National Government: Herein of Separation of Powers and Political Questions*, 6 J. PUB. L. 331 (1957).

24. 369 U.S. at 217.

25. *See* notes 29-31 and accompanying text *infra*.

26. For a discussion of the *Baker v. Carr* formulation, see Henkin, *supra* note 8, at 603-04 and Tigar, *supra* note 2, at 1153-55, 1163-66.

27. 246 U.S. 297 (1918).

Villa had confiscated in Mexico. Villa had acted under the authority of General Carranza, head of the revolutionary government that had been recognized by the United States. The Court upheld the taking of the hides on the grounds that the legitimacy of the Carranza government had been established. The Court held that once the executive branch had decided to recognize a foreign government, the judiciary was bound and would not inquire further into the regime's legitimacy: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[28]

The Court in *Oetjen* identified the power to conduct foreign relations as derived from a constitutional provision expressly granting power to the executive to receive foreign ambassadors.[29] This provision was said to imply the power to recognize foreign governments. The foreign affairs power also has been seen as derived from general grants of power such as the provisions vesting the executive power in the President.[30] The latter construction is a bold extrapolation from the text of the Constitution and is demonstrated in *United States v. Curtiss-Wright Export Corp.*[31] There is a considerable distinction between the inferences of foreign affairs powers made in *Oetjen* and those made in *Curtiss-Wright*.

In *Curtiss-Wright*, an assertion was made that Congress had unconstitutionally delegated powers to the President. The President was empowered to make it a crime to sell weapons to countries involved in fighting in the Chaco region of South America if he determined that prohibiting the sale of such weapons would help to re-establish peace. The President issued such a proclamation in 1934, after making the required determination, and the defendant was indicted for having made prohibited sales.

The Court stated that in the field of foreign relations, the political

28. *Id.* at 302, *quoted in* Baker v. Carr, 369 U.S. 186, 211 n.31 (1962). According to the court in Matter of Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 947 (N.D. Cal. 1975), *Baker* quoted *Oetjen* in implicit disapproval of such sweeping statements which indicate that all questions involving foreign affairs are nonjusticiable.

Professor Henkin believes that the word "propriety" in the *Oetjen* extract probably did not mean constitutionality, and thus "the statement is unexceptionable and commonplace: so long as the political branches are acting within their constitutional powers, 'wisdom,' 'desirability,' [and] 'propriety' are not for the courts to review." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 450 n.26 (1972).

29. "[H]e shall receive Ambassadors and other public Ministers . . . ." U.S. CONST. art. II, § 3.

30. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

31. 299 U.S. 304 (1936).

branches have broad powers not subject to judicial examination.[32] Additionally, it noted that if the challenged delegation were confined to internal affairs and were held invalid, it might nevertheless be sustained on the grounds of its importance in foreign relations.[33] The separation of powers thus plays a different role when foreign relations are involved than when only domestic affairs are at issue. *Curtiss-Wright* shows that courts must give the political branches more deference in the conduct of foreign relations than in the conduct of internal affairs.[34]

The reasons that courts should not interfere with foreign affairs decisions of the political branches were vividly pointed out in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp*.[35] In *Waterman*, the Civil Aeronautics Board (CAB) had granted to Chicago & Southern a certificate for a foreign air route but had denied it to Waterman. The President had expressly approved of the decision by the CAB. The Supreme Court held that no court could review the President's decision because it presented a political question dealing with foreign affairs. The Court stated,

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[36]

The Court was concerned with the separation of powers and with the broad discretion to conduct foreign affairs which has been vested in the political branches.[37] The Court's phrase in which the judiciary's lack of "aptitude, facilities [and] responsibility" was stressed includes

32. Justice Powell, in Goldwater v. Carter, 444 U.S. 996 (1979), cited *Curtiss-Wright* as authority for his statement that "[t]he Court has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion that otherwise might run afoul of the nondelegation doctrine." *Id.* at 1000 n.1 (Powell, J., concurring).

33. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).

34. In concluding that Goldwater v. Carter, 444 U.S. 996 (1979), presented a political question, Justice Rehnquist relied on the distinction made by the Court in *Curtiss-Wright* between foreign and internal affairs. 444 U.S. at 1003-04 (Rehnquist, J., concurring). *See* note 53 *infra*.

35. 333 U.S. 103 (1948).

36. *Id.* at 111.

37. Professor Henkin, in reference to *Waterman*, said that although courts spoke at times of the "special political quality of foreign relations and the need for the nation to speak with one voice," they only did so "to explain the broad constitutional powers of the President or Congress." Henkin, *Viet-Nam in the Courts of the United States: "Political Questions,"* 63 AM. J. INT'L L. 284, 287 (1969). Henkin emphasized that in none of the cases "did the Court say that the President or the Congress may have violated their constitutional powers but the courts are in no position to give relief." *Id.* For further discussion on the

language very similar to that used in some of the last five factors of the *Baker* test. *Waterman* thus seems to be a prelude to *Baker*.

C. Recent Application of *Baker v. Carr*

In *Powell v. McCormack*,[38] the Supreme Court relied on the textual commitment element of the *Baker* test to conclude that the issue did not present a political question. In *Powell*, a Congressman contested the decision of the United States House of Representatives to exclude him from his seat because of alleged misconduct. The Court held that the Constitution grants the House the power to exclude a member only if he does not meet the requirements of article one, section two, clause two, and for no other reason.[39] Although the Court in *Powell* emphasized the textual commitment factor of the *Baker* test, *Powell* was a domestic affairs case. Other courts have held that in foreign affairs cases, the remaining five factors should be given more weight.[40]

In *Atlee v. Laird*,[41] a class action suit challenging the constitutionality of American participation in the Vietnam War, the District Court

need for the nation "to speak with one voice," see notes 114-16 and accompanying text *infra*.

Professor Henkin's analysis of *Curtiss-Wright* was in direct accord with his views on *Waterman*. On *Curtiss-Wright*, Henkin stated, "[T]he Court held that an action by the President pursuant to delegation by Congress was amply within their powers; it did not say that the constitutional validity of the action could not be examined." Henkin, *supra*, at 287 n.12. *See also* notes 32-34 and accompanying text *supra*.

38. 395 U.S. 486 (1969).

39. *Id.* at 522. Powell met the qualifications of art. I, § 2, cl. 2, of the United States Constitution, which provides: "No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

40. *See, e.g.*, Matter of Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd without opinion sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973). *See* notes 41-46 and accompanying text *infra*.

41. 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973). *Atlee* was followed in Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), where the court stated, "We find particularly persuasive the scholarly opinion of Judge Adams of the Third Circuit in *Atlee v. Laird*, . . . the only case involving the Southeast Asia conflict which the Supreme Court has affirmed. In all other cases where review was sought, certiorari has been denied . . . ." *Id.* at 1313 n.3. *See also* Harrington v. Schlesinger, 373 F. Supp. 1138 (E.D.N.C. 1974) (expressly following *Atlee*).

Numerous cases on the Southeast Asia conflict were dismissed on the ground that a political question was involved. For a collection of cases, see Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974). *See generally* Henkin, *supra* note 37, at 284.

for the Eastern District of Pennsylvania, in finding a nonjusticiable question, observed,

> [I]n *Powell*, a case concerning domestic affairs, the primary thrust of the political question discussion naturally centered on the textual commitment test, . . . [but] when dealing with a foreign policy case, the court should focus its attention primarily on the other factors discussed above and crucially important in the foreign affairs area.[42]

The crucial factors identified by *Atlee* that distinguished the consideration required for domestic and foreign political questions were essentially the same as the last five factors in the *Baker* test. The court in *Atlee* stressed, among other elements, the "inherent inability of a court to predict the international consequences flowing from a decision on the merits," the difficulty in finding applicable standards, and the need for a court to review "an initial determination made by the political branches."[43]

The conclusion in *Atlee*, that the last five factors of the *Baker* formulation should be focused upon when the issue involves foreign affairs, was followed in *Matter of Naturalization of 68 Filipino War Veterans*.[44] The controversy in *68 War Veterans* concerned whether Filipinos who had fought in the Philippine Army in the 1940's could be naturalized. The District Court for the Northern District of California acknowledged that a political question analysis is based on a "sensitive appreciation of the relationship between the judiciary and the coordinate branches of the federal government,"[45] and not on a constitutional demand. After stressing that such an analysis required a careful balancing of the particular facts and circumstances of each case, the court proceeded to follow the six-part *Baker* test[46] to find that the case presented a justiciable question.[47]

The most recent Supreme Court pronouncement on the political question doctrine was in *Goldwater v. Carter*.[48] The circuit court had found justiciable the issue of whether the President had exceeded his authority in terminating the 1954 Mutual Defense Treaty with the Re-

42. 347 F. Supp. 689, 703 (1972).

43. *Id.* at 702-03. The court in *Atlee* also stressed lack of access to relevant information.

44. 406 F. Supp. 931 (N.D. Cal. 1975). "The Court believes that *Baker* and the other authorities on point mandate that when dealing with foreign affairs a court should direct its attention primarily to the remaining formulations in the *Baker* test." *Id.* at 946.

45. *Id.* at 944.

46. *See* notes 18-26 and accompanying text *supra*.

47. 406 F. Supp. at 943.

48. 444 U.S. 996 (1979). For an excellent analysis of *Goldwater v. Carter*, see *Recent Developments*, 21 HARV. INT'L L.J. 567 (1980). *See* Note, *Presidential Power to Terminate Treaties Without Congressional Action*, 5 INT'L TRADE L.J. 68 (1979); *see also* 66 A.B.A. J. 383 (March 1980).

public of China without consent from either house of Congress.[49] The Supreme Court vacated the circuit court's judgment and ordered the case dismissed.[50]

Justice Rehnquist, speaking for the Court in a plurality opinion, believed the issue presented a nonjusticiable political question because it involved the President's authority in the conduct of foreign relations and the extent to which Congress can negate the President's actions.[51] Justice Rehnquist further stated: "I think that the justifications for concluding that the question here is political in nature are . . . compelling . . . because it involves foreign relations,"[52] and cited *Curtiss-Wright* for the distinction between issues solely relating to internal affairs and those involving foreign affairs.[53]

The principle to be drawn from the cases discussed above is that when foreign, rather than domestic, affairs are involved, application of the same six-part *Baker* test may lead to different results. Each of the six factors of the *Baker* test identify different aspects of the separation of powers. Given that the nonjusticiability of a political question is "primarily a function of the separation of powers"[54] and that the political branches have more expansive powers when conducting foreign rather than domestic affairs, the last five of the six *Baker* factors play a larger role when courts make political question determinations in foreign affairs cases. When any of these five factors are implicated, courts must give deference to the political branches in which a broad foreign affairs power has been vested.

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49. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979).

50. Justices Powell and Rehnquist filed separate concurring statements, Justice Brennan filed a dissent, and Justice Blackmun dissented in part. Justice Marshall concurred in the result without joining any of the statements. Justice Powell found that the issue was not yet ripe for adjudication, but considered the case otherwise justiciable, *see* 446 U.S. at 997; Justice Rehnquist and the plurality of the Court found the case to be a nonjusticiable political question, *see id.* at 1002. Justice Brennan did not believe a political question was present. He would have reached the merits and found for the President, and thus would have affirmed the judgment of the court of appeals. For further discussion of Justice Brennan's dissent, see note 53 *infra*.

51. 444 U.S. 996, 997 (1979). Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and Stevens in his plurality statement.

52. *Id.* at 1003.

53. *See* note 34 *supra*. Justice Brennan, in his dissent, stated that "the plurality . . . profoundly misapprehends the political-question principle as it applies to matters of foreign relations." 444 U.S. 996, 1006 (1979). In Justice Brennan's view, the doctrine, if properly understood, "does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power." *Id.* at 1007 (emphasis in original). Thus, Justice Brennan believed that the case was within the competence of the courts because "[t]he issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion . . . ." *Id.*

54. Baker v. Carr, 369 U.S. 186, 210 (1962).

II. Background of *Hopson v. Kreps*

In *Hopson v. Kreps*,[55] native Alaskan Eskimos claimed that Department of Commerce regulations setting quotas on subsistence whaling were issued without authority.[56] Authority to promulgate regulations was conferred by the Whaling Convention Act of 1949,[57] which was enacted to implement domestically the International Whaling Convention of 1946.[58]

A. The International Whaling Convention

The 1946 Convention was convened by the leading whaling nations[59] in an attempt to regulate the whaling industry and to provide for a permanent supervisory body.[60] The Convention is enforced primarily through a detailed set of regulations called a Schedule.[61] An International Whaling Commission (IWC),[62] composed of one member

55. 462 F. Supp. 1374 (D. Alaska 1979), *rev'd*, 622 F.2d 1375 (9th Cir. 1980).

56. The Eskimos also claimed that the regulations violated United States trust responsibilities to them; the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1976); and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976). Both courts, however, focused solely on the Eskimos' first claim as to the validity of the regulations and the preliminary question of justiciability.

57. 16 U.S.C. §§ 916-916(e) (1970).

58. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72, [hereinafter cited as 1946 Convention]. The IWC Convention has been amended once, in 1956. Protocol for the Regulation of Whaling, Nov. 19, 1956, 10 U.S.T. 952, T.I.A.S. No. 4228, 338 U.N.T.S. 366.

59. The original 15 signatories were Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the Soviet Union, the United Kingdom, and the United States. Present membership includes the original signatories plus Iceland, India, Italy, Japan, the Republic of Korea, Mexico, Oman, Panama, Papua New Guinea, Seychelles, Spain, Sweden and Switzerland. 1946 Convention, *supra* note 58, at art. III, para. 4.

60. Previous conventions and agreements had failed to provide for an ongoing agency. Protocol for the Regulation of Whaling, June 24, 1938, 53 Stat. 1794, T.S. No. 944, 196 L.N.T.S. 131; Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, T.S. No. 933, 190 L.N.T.S. 79; Convention for the Regulation of Whaling, Sept. 24, 1931, 49 Stat. 3079, T.S. No. 880, 155 L.N.T.S. 349.

61. The Schedule of Whaling Regulations is incorporated into the 1946 Convention, *supra* note 58. The Schedule can be amended by a majority vote of three-fourths of the IWC. A simple majority vote will suffice for any action which does not require a modification of the Convention or Schedule. 1946 Convention, *supra* note 58, at art. III, para. 2. After a Schedule amendment has been adopted, it becomes binding on all member nations after 90 days. *Id.* at art. V, para. 3. *See* note 65 and accompanying text *infra*.

62. 1946 Convention, *supra* note 58, at art. III, para. 1. For a detailed examination of the IWC, see McHugh, *The Role and History of the International Whaling Commission* in THE WHALE PROBLEM 317-20 (W. Schevill ed. 1974); Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 ECOLOGY L.Q. 326, 352-80, 598-600, 605-38 (1977). *See also* Christol, Schmidhauser & Totten, *The Law and the Whale: Current Developments in the International Whaling Controversy*, 8 CASE W. RES. J. INT'L L. 149 (1976); Grieves, *Leviathan, The International Whaling Commission and Conser-*

from each contracting government,[63] was established by the Convention. The IWC has authority to amend Schedule provisions by adopting regulations respecting conservation and management of whale stocks, including setting of seasons and quotas.[64] Under the Convention, any member country can file an objection with the IWC to any Schedule amendment within ninety days, and the amendment will not be binding on that country.[65]

B. The International Whaling Commission

Since its inception in 1956, the IWC has been largely ineffective in preventing systematic overexploitation of whales by member nations who maneuver within the Schedule regulations.[66] The lowest ebb came in 1964 when several nations, including the United States, considered withdrawing from the IWC.[67] IWC meetings had always been rife with disagreement, and the tension increased in the early 1970's due to public demand for open meetings.[68]

In the 1970's, the IWC finally began to be an effective interna-

vation as Environmental Aspects of International Law, 25 W. POL. Q. 711 (1972); Note, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?* 8 N.Y.U. J. INT'L L. & POL. 211 (1975). The annual IWC Reports are another good source for the history of the IWC. (The reports are not available, however, until nearly two years after each meeting takes place).

63. The commissioner from each member nation may be accompanied by nonvoting experts. 1946 Convention, *supra* note 58, at art. III, para. 1. The IWC meets annually in June. Special meetings are occasionally called. *See* note 85 *infra*.

64. 1946 Convention, *supra* note 58, at art. V, para. 1.

65. *Id.* at art. V, para. 3. If a nation objects, the other member nations are given an additional ninety-day period in which to file objections.

66. *See* Norris, *Marine Mammals and Man*, in COUNCIL ON ENVIRONMENTAL QUALITY, WILDLIFE AND AMERICA 320, 329 (H. Brokaw ed. 1978). *See also* 1 NATIONAL MARINE FISHERIES SERV., U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT: INTERNATIONAL WHALING COMM'N'S DELETION OF NATIVE EXEMPTION FOR THE SUBSISTENCE HARVEST OF BOWHEAD WHALES 8-10 (Oct., 1977) [hereinafter cited as FEIS].

One of the deficiencies of the IWC is the lack of enforcement power. Voluntary cooperation is relied on to implement the 1946 Convention. The effectiveness of the IWC is further diminished by the exemption provision available to objecting nations. It is interesting to note, however, that at the 1946 Conference, the objection clause was not favored by Norway and Great Britain, two major whaling nations. The United States supported the clause on the ground that it was essential to keeping countries in the IWC. Scarff, *supra* note 62, at 357 n.160. Lack of observers to monitor the catch has been another factor hindering the effectiveness of the IWC. An international observer scheme, which had been proposed as early as 1955, was finally implemented in 1972. *Id.* at 365, 367 n.237. The Soviet Union, however, temporarily evaded the observer scheme in 1973 when its whaling ships left port without observers aboard. Norris, *supra*, at 331.

Despite its shortcomings, the IWC has served an important function by providing an international forum. Without this, the commercial whaling industry might have harvested many whale species to near extinction.

67. Norris, *supra* note 66, at 329-30.

68. *Id.* at 330-31. The United States public, prompted in part by the ecology move-

tional body, due in part to the United States' strong position in favor of whale conservation.[69] Since 1972, the United States has urged all nations to support a ten-year moratorium on commercial whaling.[70] Although the moratorium was never accepted by the IWC, a new system of whale management was adopted in 1974 which was the strongest commitment to conservation ever taken by the IWC.[71] This system, called the New Management Procedure (NMP), placed selective moratoria on whale stocks with depleted populations.[72] Today the United States maintains its position as a major proponent of worldwide whale conservation[73] and has even threatened economic sanctions against na-

ment, became increasingly indignant at the evasions of IWC control by the whaling industry. To many, the whale symbolized "man's mindless destruction of nature." *Id.* at 330.

69. The United States has consistently urged other nations to accept the IWC's amendments without objection, regardless of hardships which might ensue. 1 FEIS, *supra* note 66, at 3.

70. The resolution for the moratorium, after being passed by the United States Congress, was presented by the United States at the United Nations Conference on the Human Environment, held in Stockholm. The resolution, number 33, was unanimously adopted. U.N. Conference on the Human Environment (Stockholm) at U.N. Doc. A/CONF. 48/14 at 12 (June 5-16, 1972). The United States presented the resolution at the IWC meeting two weeks later, but it was defeated six to four, with four abstentions. 24 IWC REP. 25 (1972). In 1973, the United States again presented the resolution for a ten-year moratorium on all commercial whaling to the IWC. This time the proposal won a majority vote, but not the necessary three-fourths majority. The vote was eight in favor, five opposed, and one abstention. 25 IWC REP. 26 (1973). Though the moratorium was twice defeated, whaling nations were forewarned of the need to respond to the biologically inadequate whale management systems. 1 FEIS, *supra* note 66, at 8-9; Norris, *supra* note 66, at 331; Scarff, *supra* note 62, at 367-68.

In 1973, following defeat of the moratorium, the IWC set a quota on the minke whale harvest which directly affected Japan and the Soviet Union. The two nations formally objected and set their own quota at a level of 3000 whales above that recommended by the IWC. This action caused great international protest. A boycott of all Japanese and Soviet exports was organized by several American conservation groups. Those who pledged to support the boycott numbered more than five million and were drawn from twenty-one conservation, humane and environmental groups. By the spring of 1974, the major whaling nations were being pressured both by American citizens and by the United States Government to abide by the whale conservation measure. Scarff, *supra* note 62, at 368, 369 nn.255 & 256. *See* note 74 and accompanying text *infra*.

71. The United States presented the resolution for a moratorium again in 1974, but this time it was set aside in favor of the "Australian Amendment," a compromise proposal (now called the New Management Procedure (NMP)). Japan and the Soviet Union were the only nations opposed. Norris, *supra* note 66, at 331; Scarff, *supra* note 62, at 369-70.

72. The NMP was designed to give the IWC more ecologically sound guidelines within which to determine annual quotas. The NMP requires that a whale be protected from harvest if its stock is more than 10% below Maximum Sustainable Yield. Its purpose is to prevent depletion of stocks to critically low levels. Since the NMP is based on the recommendation of the IWC's Scientific Committee, it is thought that this will establish greater international credibility and thus assure the success of the NMP. 1 FEIS, *supra* note 66, at 9-10, 19; Norris, *supra* note 66, at 331; Scarff, *supra* note 62, at 369-70.

73. The United States policy has remained consistent throughout the past three administrations. The United States continues its vigorous support for a moratorium on all com-

tions that thwart the attainment of this goal.[74]

C. The Bowhead Whale

The bowhead whale, *Balaena mysticetus*, is considered to be one of the most endangered whale species.[75] Since 1931, the bowhead has been protected under international law from the commercial whaling industry.[76] The Eskimos, however, have been able to hunt the bowhead without limitation under a Schedule exemption for aboriginal whaling.[77]

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mercial whaling. This was evidenced at the 1980 IWC meeting in which the United States delegation again proposed a moratorium. IWC/32/05 of the 32nd Annual Meeting of the IWC (June 21-26, 1980).

President Carter, in his Environmental Message of May 23, 1977, expressed his strong commitment to whale conservation, which included support for stricter IWC regulations and the request that reports be made to him of "any actions by other countries that have diminished the effectiveness of the IWC conservation program." 1 FEIS, *supra* note 66, at 11, 24-25. President Carter also sent a message to the IWC in 1977 urging whale conservation. *Id.* at 25.

74. The 1971 Pelly Amendment to the Fisherman's Protective Act of 1967, 22 U.S.C. § 1978 (1976), permits imposition of an embargo against fishery products from countries whose actions threaten the effectiveness of IWC whale conservation programs. In 1973, the Secretary of Commerce, pursuant to authority conferred by the Pelly Amendment, certified that the actions by Japan and the Soviet Union in disregarding the IWC quota diminished the effectiveness of the IWC. The President decided to postpone his response to the certification for an embargo until the following year, when he could evaluate Japanese and Soviet actions regarding 1974 quotas. *See* Comment, *Not Saving The Whales: President Ford Refuses to Ban Fish Imports from Nations Which Have Violated International Whaling Quotas*, 5 ENVT'L L. REP. 10044 (1975). This threat, however, resulted in compliance by Japan and the Soviet Union, and neither nation has filed any objections since 1973, despite a continued reduction in catch limits. Threats of economic sanctions seem also to have discouraged other member nations from placing objections to IWC quotas. 1 FEIS, *supra* note 66, at 9-10, 79. As one observer at the 1974 IWC meeting stated: "The economic strategy adopted by the American conservation community is working. . . . No delegate to the London conference, speaking candidly, could deny the profound impact of the citizens boycott, and of official U.S. threats of economic retaliation." Scarff, *supra* note 62, at 369 n.256. *See* note 70 *supra*.

75. 1 FEIS, *supra* note 66, at 6; NAT'L OCEANIC AND ATMOS. ADMIN., U.S. DEP'T OF COMMERCE, A SPECIAL REPORT TO THE INTERNATIONAL WHALING COMMISSION, BOWHEAD WHALES (1978) [hereinafter cited as NOAA Report]; Scarff, *supra* note 62, at 400.

76. The bowhead was first protected under the 1931 Convention for the Regulation of Whaling, *supra* note 60, at art. 4. Currently it is protected under the 1946 Convention, *supra* note 58, at Schedule para. 8(c) (amended 1977). Most recently, protection was granted under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1089 T.I.A.S. No. 8249, app. 1, 12 ILM 1085 (1973).

Domestically, commercial whaling of the bowhead is prohibited by the Endangered Species Act of 1973, 16 U.S.C. § 1538 (1976), and the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371 (1976). Also, the bowhead has been on the endangered species list since 1970. 36 Fed. Reg. 1264 (1971).

77. The original exemption provided: "It is forbidden to take or kill gray whales or right whales, except when the meat and products of such whales are to be used exclusively for local consumption by the aborigines." 1946 Convention, *supra* note 58, at Schedule

Scientific studies show a decline in the bowhead stock to a dangerously low population level.[78] At the same time, increased annual take by the Eskimos[79] and possible lethal effects of oil pollution[80] on the remaining bowheads have led to grave concern for the bowhead's survival.[81] In June 1977, the IWC voted sixteen to zero, with the United States abstaining, to ban all bowhead whaling by Alaskan Eskimos.[82] The Eskimos urged the United States to object, claiming that the bowhead hunt was essential to their cultural and nutritional survival.[83] The United States decided not to exercise its option to object to the Sched-

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para. 2. The language was modified slightly in 1964 to read: "It is forbidden to take or kill gray whales or right whales except by aborigines or a Contracting Government on behalf of aborigines and only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines." *Id.* The bowhead is grouped within the right whale category for IWC purposes. *Id.* at Schedule para. 18.

In 1977, however, the provision was changed to read: "Notwithstanding the [prohibitions on hunting] . . . the taking of gray whales, and of bowhead whales from the Bering Sea stock, by aborigines or a Contracting Government on behalf of aborigines is permitted, but only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines and further provided, with respect to the Bering Sea stock of bowhead whales, that: (1) In 1978, hunting shall close when either 18 have been struck or 12 landed; (2) It is forbidden to strike, take or kill calves or any bowhead whale accompanied by a calf." *Id.*

78. *See* 1 FEIS, *supra* note 66, at 31-34; 2 FEIS, *supra* note 66, at app. I.

79. *See* 1 FEIS, *supra* note 66, at 37-43; 2 FEIS, *supra* note 66, at app. E; NOAA Report, *supra* note 75, at 51-53; Scarff, *supra* note 62, at 401, 632-33.

80. In 1977 the Scientific Committee stressed that the risks of harvesting the bowhead were exacerbated "in the face of environmental perturbations (such as potential pollution hazards associated with petroleum development in the North American Arctic)." 1 FEIS, *supra* note 66, at 18. Also, increased barge and steamer traffic within the bowhead's migration route might further disrupt the bowhead population. *Id.* at 30-31.

81. 1 FEIS, *supra* note 66, at 20. Congress explicitly recognized the bowhead problem and allocated funds for increased research on the bowhead in the Whale Conservation and Protection Study Act of 1977, 16 U.S.C. § 917 (1976).

82. Since 1972, the Scientific Committee of the IWC has paid special attention to the bowhead and has requested information from Denmark, the Soviet Union and the United States on the aboriginal kill of bowheads. *1972 Scientific Committee Report*, in 23 IWC REP. 34; 1 FEIS, *supra* note 66, at 12. The Scientific Committee expressed particular concern about bowhead loss caused by United States aboriginal fishery and repeatedly urged the United States to take efforts to reduce the waste. *Id.* at 12-17. Depletion of the bowhead stock became so severe that in 1977, the Scientific Committee unanimously recommended to the IWC deletion of the aboriginal exemption. One of the factors considered critical by the Scientific Committee was that current population estimates indicated that, at best, the bowhead population was only 10% of its initial stock size. These figures clearly placed the bowhead within the protection category established by the NMP. Another key factor was that the 1976 and 1977 catch statistics showed a dramatic increase in the number of bowheads struck and lost by the Eskimos. *Id.* at 17-20. *See also* 2 FEIS, *supra* note 66, at app. C. For an analysis of the Scientific Committee's deliberations, see *id.* at app. D.

83. Hunting of the bowhead has been an integral part of the Eskimo culture for millenia. The Eskimos' hunting techniques and methods, though still largely traditional, have been modernized in many ways. Light seal-skin-covered boats (umiaks), powered by oar or

ule amendment,[84] but instead chose to work within the IWC, both to gain relief for the Eskimos and to achieve protection for the bowhead.[85]

D. Statutory Claim

The Eskimos assert that the Whaling Convention Act of 1949 was intended to apply only to commercial whaling, and that the Department of Commerce therefore has no authority under the Act to regulate native subsistence hunting.[86] Determining the proper application of

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motor, hand-held harpoons and shoulder guns are part of their equipment. Snowmobiles have replaced dogsleds. Scarff, *supra* note 62, at 402 n.425.

Political and social organization of the Eskimo village is closely related to the hunt. Village feasts and festivals and craft industry from baleen and whale bone revolve around the spring hunt and its products. Restriction of bowhead whaling has the potential for disrupting community and cultural integrity.

The unique nutritional value of whale meat and the physiological characteristics of the Eskimos also make the bowhead hunt essential to Eskimo survival. Foods that traditionally have been used to mitigate nutritional shortages in years of low whale harvest (primarily walrus and caribou) are no longer available due to changes in migration patterns, depletion of stocks, and government regulation of hunts. Research is now being conducted to determine possible alternative food sources which are both palatable to the Eskimo and not prohibitively expensive. *See* 1 FEIS, *supra* note 66, at 45-59; NOAA Report, *supra* note 75, at 55-61.

84. After this decision, the Eskimos brought suit for injunctive relief to compel the Secretary of State to object. *See* notes 119-21 and accompanying text *infra*.

85. At a special December meeting of the IWC in 1977, the United States was successful in obtaining a 1978 quota for the Eskimos of 12 whales killed or 18 whales struck, whichever comes first. *See* 43 Fed. Reg. 9486 (1978) (to be codified in 50 C.F.R. § 351.36); 43 Fed. Reg. 13,883 (1978) (to be codified in 50 C.F.R. § 230.74(c)), as amended, 43 Fed. Reg. 22,213-14 (1978). *See also* note 77 *supra*. The quota subsequently has been raised three times.

Following the December meeting, the United States "embarked upon an ambitious effort to develop a comprehensive management and regulatory program to implement the Commission's decision." NOAA Report, *supra* note 75, at 4. In 1978, during the spring whale hunt, the federal government and the Eskimos coordinated efforts in an intense research study to count whales and collect information. The Eskimos organized the Alaska Eskimo Whaling Commission whose purpose was "to bring the hunt within the limits established by the Commission, to insure proper monitoring of whaling activities, to increase the efficiency of whaling techniques, and to provide for the full utilization of all whales taken." *Id. See generally id.* at 1-2, 4-11.

86. The basis of the Eskimos' claim is that the Act and the IWC Convention apply to "whale catchers" and that this term was never intended to include small native craft such as umiaks. At the conference which drafted the 1946 Convention, there had been some discussion as to whether aboriginal whaling was covered under the Convention. Apparently in response to this concern, the IWC explicitly exempted aboriginal whaling from the Schedule regulations. For the full exemption provision, see note 77 *supra*. *See* Brief for Appellant at 14-20, Brief for Appellee at 34-37, Hopson v. Kreps, 622 F.2d 1375 (9th Cir. 1980); Scarff, *supra* note 62, at 402 & n.428.

The 1946 Convention, *supra* note 58, defines "whale catcher" as "a ship used for the purpose of hunting, taking, towing, holding on to, or scouting for whales." *Id.* at art. II. The Whaling Convention Act of 1949, *supra* note 57, defines "whale catcher" as a "vessel" which denotes "every kind, type, or description of water craft or contrivance subject to the

the Act involves the classic judicial function of interpreting statutes.[87] Under *Hopson*, however, this would also necessitate interpretation of the 1946 Convention, a treaty which required domestic implementation through the 1949 Act. When a treaty is not self-executing but requires implementing legislation, such legislation, not the treaty, operates as the law of the land.[88] Courts thus have authority to interpret a treaty that is to be applied as the domestic law of the United States.[89]

When construing treaties, courts are entitled to give great weight to executive interpretation of its terms[90] and to note the practical construction given the treaty by the parties involved.[91] The United States takes the position that aboriginal whaling is covered by the treaty.[92] Recent evidence of this stance was the United States' vote at the 1977 IWC meeting in favor of adopting a bowhead quota for Eskimos in the Schedule.[93] Moreover, since the adoption of the Convention, no party to it has questioned its jurisdiction over aboriginal whaling.[94] The IWC has specifically regulated aboriginal whaling several times.[95]

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jurisdiction of the United States used, or capable of being used, as a means of transportation." *Id.* at § 916(e) & (h).

87. The Constitution grants courts the power to construe treaties and statutes. *See* note 1 *supra*.

88. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829); U.S. CONST. art. VI, § 2. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 157 (1972).

89. L. HENKIN, *supra* note 88, at 157. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 150 (1965): "Under the Law of the United States, courts in the United States have exclusive authority to interpret an international agreement to which the United States is a party for the purpose of applying it in litigation as the domestic law of the United States."

90. *See* Neilsen v. Johnson, 279 U.S. 47, 52 (1929); Charlton v. Kelly, 229 U.S. 447, 468 (1913); United States v. Rausher, 119 U.S. 407 (1886). *But see* Perkins v. Elg, 307 U.S. 325 (1939). *See generally* Scharpf, *supra* note 6, at 545 & n.100, 546 & n.102.

91. *See* Pigeon River Co. v. Cox Co., 291 U.S. 138, (1934); Factor v. Laubenheimer, 290 U.S. 276 (1933); Terrace v. Thompson, 263 U.S. 197, 223 (1923); United States v. Texas, 162 U.S. 1, 23 (1896); Kinkead v. United States, 150 U.S. 483, 486 (1893). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (1965) (nine criteria for treaty interpretation).

92. Affidavit of John Negroponte, Deputy Assistant Secretary of State for Oceans and Fisheries, *quoted in* Hopson v. Kreps, 462 F. Supp. 1374, 1378-79 (D. Alaska 1979).

93. 462 F. Supp. at 1379.

94. *Id.* at 1378; Brief for Appellee at 37-38, Hopson v. Kreps, 622 F.2d 1375 (9th Cir. 1980). Furthermore, the action by the IWC in adopting the ban on bowhead whaling at the June 1977 meeting "implies that the Commission interpreted the Convention as applying to native's subsistence whaling." 1 FEIS, *supra* note 66, at 19.

95. *See* Brief for Appellee at 37 & n.23, Hopson v. Kreps, 622 F.2d 1375 (9th Cir. 1980).

III. The Judicial Analysis of the Political Question Issue in *Hopson v. Kreps*

A. The District Court for the District of Alaska

The district court in *Hopson* applied the six-part *Baker* test in analyzing the factors presented and concluded that the issue constituted a nonjusticiable political question. The court stated that the conduct of foreign relations is committed to the political branches and stressed that the separation of powers doctrine "requires that some 'legal' decisions are not to be made by courts."[96]

In applying the *Baker* test, the court first considered whether there was a "textually demonstrable constitutional commitment" of the issue. The Eskimos had asked the court to interpret the 1949 Act and the 1946 Convention. The Constitution expressly grants courts the power to decide cases arising under treaties and laws of the United States.[97] Interpretation of the treaty questioned in *Hopson*, however, is inextricably bound to foreign policy considerations.[98] The Constitution commits, by specific grants of power and through broad judicial interpretation, the conduct of foreign relations to the political branches.[99] The court found there was no clear textual commitment of the issue and so examined the remaining five factors.

The court next considered whether there was a lack of "judicially discoverable and manageable standards." Traditional standards for courts to follow when construing treaties require deference to the executive interpretation[100] and consideration of the practical construction by the parties.[101] In *Hopson*, the executive interpretation that the IWC does have jurisdiction over aboriginal whaling is in accord with the interpretation given by the other member nations of the IWC.[102] Foreign policy elements are involved in the executive interpretation in the sense that the decision includes consideration of a complex web of factors interwoven with speculation as to how other countries will react to the United States' position. The Supreme Court has acknowledged that courts have "neither aptitude, facilities nor responsibility"[103] to review executive foreign policy decisions because the "very nature" of such "delicate, complex" decisions, which "involve large elements of prophecy," is political.[104] Thus, the district court concluded that al-

96. 462 F. Supp. 1374, 1383 (D. Alaska 1979).
97. *See* note 1 *supra*.
98. Hopson v. Kreps, 462 F. Supp. 1374, 1378 (D. Alaska 1979).
99. *See* notes 29-31 and accompanying text *supra*.
100. *See* note 90 *supra*.
101. *See* note 91 *supra*.
102. *See* notes 92-95 and accompanying text *supra*.
103. Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).
104. *Id.*

though the authority to interpret treaties and statutes is within the power of courts, they nevertheless lack judicially manageable standards to assess the foreign policy element.

Third, the court considered whether reaching the merits necessitated an "initial policy determination of a kind clearly for nonjudicial discretion," determining that the foreign policy involved in *Hopson* is undeniably outside judicial discretion. The court would be required to assess the international political situation on whale conservation as well as the delicate issue of the survival of ancient Eskimo traditions.[105] The executive branch determined that the United States policy of enforcing the bowhead quota is to work closely "within the International Commission to obtain a quota more compatible with Eskimo nutritional and cultural needs"[106] and also to achieve protection for the bowhead. The district court reasoned that such a determination is "more appropriate for the Executive who has the responsibility and the resources to determine the relationship between the bowhead whale regulations and other aspects of American foreign policy."[107]

The court then examined whether resolution of the issue would constitute an expression of disrespect for the Executive. The court found that an independent resolution that the executive interpretation was incorrect would certainly "be an expression of disrespect for the Executive in an area where it is more competent."[108] The court also recognized that the element of disrespect takes on broader implications when foreign affairs are involved. Whereas people within this country accept review by United States courts of actions by the other branches of the government, foreigners are not as familiar with the independence of our judiciary.[109] Thus, for a court to overturn an executive decision would degrade the executive branch in the view of foreign countries.

Fifth, the court reviewed whether, in light of the international consequences of an adverse decision on the merits, there was an "unusual need for unquestioning adherence to a political decision already made." The United States has a leadership position in the IWC and has consistently urged other countries to follow the restrictions set by the IWC, despite severe domestic impact.[110] Since 1973, no nation has entered an objection to IWC regulation.[111] If the United States were the first to break this pattern, the symbolic impact on its role as the leading nation for the conservation of whales might be irreparable.[112]

105. *See* note 83 *supra*.
106. Hopson v. Kreps, 462 F. Supp. 1374, 1383 (D. Alaska 1979). *See* note 85 *supra*.
107. 462 F. Supp. at 1382.
108. *Id.*
109. *See* Brief for Appellant at 30 n.19; Brief for Appellee at 32 & n.20.
110. *See* text accompanying notes 69-74 *supra*.
111. *See* note 74 *supra*.
112. It is strongly argued that credibility of the United States position would be weak-

Furthermore, the consequences of failure by the United States to obey the IWC regulations might extend to other international fishery management efforts.[113]

Finally, the court reviewed whether an adjudication of the merits would cause embarrassing multifarious pronouncements by different branches on a single question. The need for uniformity of decision in matters of foreign relations has been considered especially important when the executive branch has already committed the United States to a position.[114] The court observed that a judicial order to the executive branch to change its position would be perceived as an act of disrespect and would damage the country's credibility in the eyes of foreign governments.[115] This position was especially compelling in light of the Court's statement in *Baker* that questions of foreign policy "uniquely demand single-voiced statement of the Government's views."[116]

The district court in *Hopson* concluded that nearly all of the *Baker* factors were present and that "any one would justify application of the political question doctrine."[117] In support of its holding, the district court relied on *Adams v. Vance*,[118] an earlier decision involving the bowhead, in which the Eskimos brought suit to compel the Secretary of State to file an objection to the IWC ban on bowhead whaling.[119] *Adams* emphasized the importance of international considerations in holding that such an order by the judiciary "deeply intrudes into the core concerns of the executive branch."[120] The court in *Adams* observed,

> This country's interests in regard to foreign affairs and international agreements may depend on the symbolic significance to

ened and its past actions seen as hypocritical. The United States would have less clout within the IWC to seek improved conservation measures. Other nations might object to IWC regulations on the grounds of their own domestic concerns. *See* Affidavits of William Aron, United States Commissioner to the June 1977 IWC meeting; Prudence Fox, United States Delegate to the IWC; John Negroponte, Deputy Assistant Secretary of State for Oceans and Fisheries, *cited in* Hopson v. Kreps, 462 F. Supp. 1374, 1378-79 (D. Alaska 1979). Affidavit of Patsy Mink, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, *quoted in* Adams v. Vance, 570 F.2d 950, 956 n.13 (D.C. Cir. 1977). *See also* 1 FEIS, *supra* note 66, at 76-81.

113. There might be "severe repercussions on other international conservation interests such as recent Inter-American Tropical Tuna Commission, tuna/porpoise agreements, the Endangered Species Convention, U.S. Bilateral Environmental Agreements with the Soviet Union and Japan, and Law of the Sea." 1 FEIS, *supra* note 66, at 80-81.

For comments by the Danish Commissioner at the June 1977 IWC Meeting, see Hopson v. Kreps, 462 F. Supp. 1374, 1380 (D. Alaska 1979).

114. *See* Scharpf, *supra* note 6, at 576.

115. *See* text accompanying notes 108-09 *supra*.

116. 369 U.S. 186, 211 (1962).

117. 462 F. Supp. 1374, 1382 (D. Alaska 1979).

118. 570 F.2d 950 (D.C. Cir. 1977).

119. *See* notes 84-85 and accompanying text *supra*.

120. 570 F.2d 950, 954 (D.C. Cir. 1977).

other countries of various stances and on what is practical with regard to diplomatic interaction and negotiation. Courts are not in a position to exercise a judgment that is fully sensitive to these matters.[121]

B. The Ninth Circuit Court of Appeals

The holding by the circuit court that *Hopson* did *not* present a political question was based on a fundamental misunderstanding of the nature of the political question doctrine. Although the court acknowledged that there were prudential dimensions to the doctrine,[122] it disregarded such considerations when making its analysis. The court reasoned that the existence of judicial power to interpret statutes and treaties, coupled with its prior decision in *United States v. Decker*,[123] precluded the need for further analysis.[124]

Although the six-part *Baker* test requires a "discriminating inquiry" to determine if any one of its elements is "inextricable from the case at bar,"[125] the circuit court considered only the "textual commitment" factor. It ignored the remaining five elements, even though other courts have deemed those elements particularly important to a political question analysis in foreign affairs cases.[126]

The circuit court based its decision on its holding in *United States v. Decker*.[127] The court in *Decker* held that the issue as to the validity of such regulations does not pose a political question merely because a decision on the merits would require interpretation of a treaty or have potential international consequences. The court, while aware of the *Baker* test, had not applied the test in reaching its decision in *Decker*.

The circuit court in *Hopson* also declined to apply the *Baker* test.

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121. *Id.* at 955. For an excellent analysis of *Adams*, see Mason, *The Bowhead Whale Controversy: Background and Aftermath of* Adams v. Vance, 2 HARV. ENVT'L L. REV. 363 (1977).

122. Hopson v. Kreps, 622 F.2d 1375, 1378 & n.3 (9th Cir. 1980).

123. 600 F.2d 733 (9th Cir. 1979), *cert. denied*, 444 U.S. 855 (1979).

124. 622 F.2d 1375, 1377-79 (9th Cir. 1980). The circuit court also rejected the government's contention that the executive's decision not to object to the Schedule amendment was an exercise of unreviewable administrative discretion. *See* Brief for Appellee at 43-46. It further stated that it would not sustain the district court's holding on the alternative ground of nonreviewability because it appeared that the holding was based on the political question doctrine. The district court had made some brief references to agency discretion but had not performed the required analysis for the reviewability issue.

Under the Administrative Procedure Act, inquiry must be made as to whether the statute precludes judicial review or whether agency action is by law committed to agency discretion. Such an analysis entails a study of the statute's language and legislative history.

125. 369 U.S. 186, 217 (1962).

126. *See* notes 41-47 and accompanying text *supra*.

127. For a discussion of *Decker*, see Evans, *Judicial Decisions*, 74 AM. J. INT'L L. 184, 198 (1980).

It found that since *Hopson* and *Decker* raised similar issues, the court was bound by its prior holding: "We cannot say that similar issues are rendered non-justiciable merely by independently applying the *Baker* criteria and finding them applicable on these facts."[128] The Supreme Court in *Baker*, however, had suggested that cases which present seemingly similar questions can obscure the need for a close functional analysis.[129] Because each of the six *Baker* factors may be of widely differing significance when applied to issues which seem very similar, a political question analysis requires that each issue be examined under its particular circumstances.[130]

The circuit court determined that *Decker* was controlling in *Hopson* because the particular question at issue in each case was the authority of executive action. In *Decker*, the challenge was to the authority of the Secretary of State to partially accept the regulations of the International Pacific Salmon Fisheries Commission pursuant to a 1937 treaty. In *Hopson*, the challenge was to the authority of the Commerce Department to promulgate the bowhead regulations.[131]

Courts have held that allegations that the executive branch has violated constitutional or statutory limitations on authority are political questions.[132] For example, in *Goldwater v. Carter*, the Supreme Court held that the charge that the President lacked authority to unilaterally terminate the United States treaty with Taiwan was a political question.[133] The circuit court in *Hopson*, however, asserted that *Goldwater*, a case decided subsequent to *Decker*, did not affect its analysis in *Decker*.[134]

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128. 622 F.2d 1375, 1379 (9th Cir. 1980).

129. *See* 369 U.S. 186, 210-11 (1962).

130. Courts have almost uniformly recognized that a political question determination requires a case-by-case analysis. *See, e.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968) "what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case"); Holtzman v. Richardson, 361 F. Supp. 544, 551 (E.D.N.Y. 1973) ("The political question exception to jurisdiction depends on the facts of the particular case"). *See also* Gilligan v. Morgan, 413 U.S. 1, 11 (1973); Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir. 1972); Drinan v. Nixon, 364 F. Supp. 854, 856 (D. Mass. 1973).

131. One crucially important distinction between *Decker* and *Hopson* is that *Decker* was an appeal from a criminal conviction. The *Decker* court stated its reluctance to withhold review when individual liberty was implicated: "Even if in other respects a traditional political question analysis could apply, we would be reluctant to declare these cases nonjusticiable because such a holding would prevent us from reviewing the propriety of appellants' convictions and prison sentences." 600 F.2d 733, 739 (9th Cir. 1979).

132. *See, e.g.*, Sarnoff v. Connally, 457 F.2d 809 (9th Cir.), *cert. denied sub nom.* Sarnoff v. Shultz, 409 U.S. 929 (1972) (constitutional challenge to executive war-making); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973). *See also* notes 41-43 and accompanying text *supra*.

133. 446 U.S. 996 (1979). *See* notes 48-53 and accompanying text *supra*.

134. 622 F.2d 1375, 1380 (9th Cir. 1980).

First, the circuit court placed great significance on the *Goldwater* opinion drawing only a plurality. Second, the circuit court stressed that the plurality opinion in *Goldwater* "emphasized that the effects of the challenged executive action were entirely *external*."[135] This observation by the plurality in *Goldwater*, however, seems completely disingenuous in light of potential domestic repercussions, especially the possible commercial ramifications, of the Taiwan treaty termination.

The challenges to authority raised in *Decker* and *Hopson* create questions of treaty interpretation, a power shared by the executive and judicial branches. The executive branch has the responsibility of interpreting a treaty as it is to be applied in the conduct of foreign relations.[136] When a treaty is to be applied as domestic law, however, courts have the authority to interpret the treaty.[137] They must nonetheless place "much weight" on the executive interpretation of the treaty.[138]

Treaty interpretation is an issue which goes to the *Baker* element of "textual commitment." As *Atlee v. Laird*[139] has shown, however, when foreign affairs are involved, the last five elements of the *Baker* test are especially important. The foregoing analysis according to the last five elements makes it clear that a political question is present in *Hopson*. Thus, although the particular issue is a challenge to the executive authority, this does not prevent invoking the political question doctrine to dismiss the case.[140]

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135. *Id.*

136. Professor Henkin stated that "[f]or international purposes, no doubt, the President determines the United States position as to the meaning of a treaty. Domestically, too, since the President has usually the principal, often the sole, responsibility to execute a treaty, the treaty means what he says it means." L. HENKIN, *supra* note 88, at 167. Professor Henkin goes on to say that "[i]t seems unlikely that a court would feel free to interpret a treaty differently if the Executive has taken a formal position on its meaning." *Id.* at 416.

137. *See* note 89 *supra*.

138. *See* note 90 *supra*.

139. *See* notes 41-43 and accompanying text *supra*.

140. An alternative way to avoid court adjudication is to couch the "authority" theory in terms of discretion, i.e., that the executive's statutory authority is so interwoven with other factors that the issue as to whether there is statutory authority cannot be separated from discretion. The Whaling Convention Act, *supra* note 57, confers authority upon the Secretary of the Interior to issue domestic regulations, *id.* at § 916k, which implement the regulations of the IWC as approved by the Secretary of State, *id.* at § 916b. The authority conferred by the Act can be viewed as including a broad discretion to interpret the Act and decide to whom the regulations apply. The question of statutory authority is so wrapped up in a web of other implications that the courts should not decide it but should leave it for the executive branch.

Professor Henkin, writing on the federal exercise of power in foreign affairs, states, "Usually, a power in question could plausibly be inferred from one of the explicit powers of the President or Congress, to which the Court has given imaginative, liberal, expansive (some will say far-fetched) readings, say, the Commerce Power, or the War Powers of Congress and the President, the limits of which have not yet been found." L. HENKIN, *supra*

Conclusion

The political question doctrine, based upon the separation of powers, serves to maintain the careful balance between the coordinate branches. The need to invoke the doctrine arises especially in cases involving foreign affairs. *Hopson v. Kreps* was such a case. An analysis of *Hopson* according to the guidelines established by the six-part *Baker* test shows *Hopson* to be a classic political question case. The factors of "embarrassment," "disrespect," and the possible international consequences make the issue one which could be better resolved by the political branches than by the courts. The Ninth Circuit thus erred in concluding that a political question was not present.

The impact *Hopson* could have on environmental concerns is obvious. The strength of the worldwide whale conservation movement, as well as of other fishery management efforts, might be seriously diminished. The implication of *Hopson*, however, extends beyond environmental cases to all political question cases. Every political question case has important precedential value because such cases do not arise often, and courts naturally look to decisions of other courts for guidance when performing a political question analysis. Thus, other courts may follow the precedent set by the Ninth Circuit in *Hopson* and adjudicate issues that should be left for the political branches to decide.

note 88, at 26. Thus, courts can find "authority" for the executive branch to act in the power arising from a broad grant of discretion. This conclusion does not mean that courts should always be precluded from interpreting treaties when United States foreign policy might be implicated. The thesis of this note is that courts should weigh all the possible factors of the particular situation and, if the circumstances are grave, as in *Hopson*, only then should courts refrain from deciding the issue on the grounds that a political question is involved.

See also Gilligan v. Morgan, 413 U.S. 1 (1973). "[I]t should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief. We hold only that no such questions are presented in this case." *Id.* at 11-12.